Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Herman West, Jr.,
Petitioner.

v.

CITY OF GULFPORT MISSISSIPPI, et. al.,
Respondents.

ON PETITION FOR A WRIT OF MANDAMUS TO THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF MANDAMUS

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15 pp

QUESTION PRESENTED

Whether plaintiff's counsel failure to timely file Appellant's brief due to the court clerk's inadvertence in timely mailing the court's judgment and properly giving notice of the court's decision granting counsel additional time to file the brief is excusable neglect.

PARTIES IN THE PROCEEDING

All parties do not appear in the caption of the case on the cover page. A list of all parties tot he proceeding in the court whose judgment is the subject of this petition is as follows:

HERMAN WEST, JR.,
PETITIONER

VERSUS

CITY OF GULFPORT, MISSISSIPPI;
KEN COMBS, in his individual and official capacity;
GEORGE H. PAYNE, JR., in his individual and
official capacity; STEPHEN BARNES, in his individual
and official capacity,
RESPONDENTS.

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CASES	PAGE NUMBER
Dyer v. MacDougall, et al., 109 F. Supp. 444	3.
Porter v. Chippewa County Co-op. Dairy, C.A.A. Wis 1947, 161 F. 2d 181	5.
U.S. v. San Geronimo Development Co., C.C.A. Puerto Rico 1946, 154 F. 2d 78, certiorari denied 64 S. Ct. 50, 329 U.S. 718, 9 L. Ed. 622	5.

STATUTES AND RULES

F.R.C.P. 58	
FRCP 73(a)	3.
28 U.S.C.A. Section 2107	3.

PETITION FOR WRIT OF MANDAMUS

Petitioner respectfully prays that a Writ of Mandamus issue to review the judgment of the Fifth circuit Court of Appeal sin the matter filed on August 13, 1998.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States court of appeals appears at Appendix 2 to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals filed its judgment on June 4, 1998. App. 1. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 13, 1998, and a copy of the order denying rehearing appears at Appendix 2. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved int he case at bar include 28 U.S.C.A. Section 2107; and FRCP 77 (d).

STATEMENT

Your Petitioner alleges he was severely prejudiced upon the Court of Appeals' decision not to accept Appellant's brief.

On April 21, 1998, Petitioner filed a Motion for Extension of Time to File Appellant's Brief out of time. The court sustained Appellant's motion and signed the judgment. The date that the judgment was signed is not indicated. However, the order stated that appellant's motion for an extension of time was granted until May 14, 1998.

Thereafter, the order wasn't entered of record until June 4, 1998 by the clerk of the court. The clerk of the court thereafter mailed to counsel for the appellant the judgment on June 8, 1998. Said judgment was not received in the attorney's office until June 9, 1998.

Your Petitioner asserts that although he was granted an extension in which to file his appeal, he wasn't aware of the sustained motion until 26 days after the expiration deadline. Upon immediately receiving the order on June 9, 1998, your Petitioner immediately prepared and submitted to the Fifth Circuit Court of Appeals his prepared briefs on June 19, 1998. [ten days after receiving the order]

The Court of appeals refused to accept Appellant's briefs and dismissed his appeal.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Petitioner respectfully requests this Honorable Court to grant this petition for a writ of mandamus because the ruling of the 5th circuit Court of Appeals is in direct conflict with decisions of other circuits.

The 5th Circuit Court of Appeals improperly dismissed Petitioner's appeal when Petitioner's counsel had presented an excusable neglect in failing to timely file the appeal.

In *Dyer v. MacDougall*, et al., 109 F. Supp. 444, the court held that plaintiff's neglect to appeal from the order within 30 days after entry thereof was excusable and that the time to appeal should be extended until 30 days from expiration of the original appeal time.

In *Dyer*, the plaintiff was a lawyer, but had no active practice or connection with federal courts. He swore that well before the expiration of 30 days from the entry of the order he was told by his attorney that he had 60 days within which to appeal. He further swore that he was never told of the entry of the order itself although he was told about the opinion and decision. The court stated that if plaintiff were a lawman, the court would entertain no doubt that the proper thing to do would be to extend the time to appeal under these circumstances because he did not learn of the entry of the judgment. And in *Dyer*, even though plaintiff is admitted tot he bar, the court believed that his neglect to take an appeal within 30 days of the entry of the original order was excusable, and that the time under FRCP 73(a) also 28 U.S.C.A. Section 2107, to a date 30 days from the time the original appeal time expired, assuming that the order is appealable.

In the case at bar, your Petitioner alleges that his case is similar to the *Dyer's* case. Your Petitioner had not learned of the entry of the judgment until after his time to file his appeal had expired. Petitioner maintains that he has been severely prejudiced in the lower court's decision not to accept his briefs. Your Petitioner filed a motion for extension of time and was waiting to receive a response from the court as to its decision. Your Petitioner cannot be held responsible for filing his brief on a date certain without having sufficient knowledge of such date. To require such would place an undue burden upon appellant.

28 U.S.C.A. Section 2107(c) specifically states as follows:

> "The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds --
>
> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> (2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

In the case at bar, Petitioner asserts that he was entitled to a notice of the entry of judgment of the order, but didn't receive the notice in time to file his appeal briefs. Secondly, as a result of not receiving this notice, Petitioner asserts that he has been unduly prejudice since the court of appeals has refused to hear the substantive argument of his appeal.

In *U.S. v. San Geronimo Development Co.*, C.C.A. Puerto Rico 1946, 154 F. 2d 78, certiorari denied 64 S. Ct. 50, 329 U.S. 718, 9 L. Ed. 622, the court held where by oversight final judgment of condemnation was not entered in 1944 s contemplated by conclusions of law previously filed, the United States could not be deprived of its right to timely appeal from final judgment actually entered in 1945, by court's attempt to enter such judgment nunc pro tunc as of 1944.

In the case at bar, your Petitioner asserts that when his judgment was entered past the deadline date for filing his brief was an oversight of the court and/or the court clerk's office. Petitioner strongly asserts that such oversight should not bar him the right to later file appellant's briefs.

Conversely, in *Porter v. Chippewa County Co-op. Dairy*, C.A.A. Wis 1947, 161 F. 2d 181, the court held where defendant asserted that it had no notice of entry of judgment but plaintiff submitted a certified coy of the notice and coy of judgment which clerk certified was sent out on date of entry of judgment to defendant pursuant to Rule 77 (d), Federal rules of Civil

Procedure, this title, appeal which was not taken until more than the statutory period after entry of judgment was required to be dismissed. Your Petitioner asserts that his case is distinguishable from *Porter*. In *Porter*, the court clerk's office presented proof that they had entered the judgment and mailed the judgment to defendant on the same day the judgment was entered. However, in the case at bar, the clerk's office failed to show any evidence to the contrary of Petitioner's claim that he didn't receive timely notice of the judgment. Such notice was crucial to Petitioner since he was order to submit his briefs by a date certain. Your Petitioner further maintains that such order could have been sent via facsimile to his counsel's office prior to the expiration of the deadline. However, this wasn't done. Finally, your Petitioner asserts that it is unclear when the judgment was signed by the judge allowing him an extension to file his brief. The judgment only states that appellant had until May 15, 1998 to file his appeal. The judgment then denotes the judge's signature and the June 4, 1998 entry of judgment. Your Petitioner strongly asserts that he should not be held responsible to timely file his appellant's briefs when his deadline expired prior to the entry of the judgment and his knowledge of said judgment.

Petitioner also asserts that the court erred in accepting his appeal briefs since the court clerk failed to comply with F.R.C.P. 58.

F.R.C.P. 58 states in part as follows:

> " . . . the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment without awaiting any direction by the court.. . .' '. . . A judgment is effective only when so set forth and when entered as provided in Rule 79(a). ' 'Entry of the judgment shall not be delayed . . ."

In the case at bar, your Petitioner asserts that the clerk erred when he failed to properly enter the order in a timely manner. Petitioner further alleges that the judgment was not effective until the date it was entered of record which was June 4, 1998. Petitioner asserts that he should have been given an extension of time to file his briefs within a time frame subsequent to the June 4, 1998 date since there was no date on the judgment denoted by the judge. Normally, an order will state, "SO ORDERED, ADJUDGED, and DECREED on this the _____ day of _____, 199___." This particular language is absent from the order in question. (See, App. 1)

Therefore, based upon the foregoing, your Petitioner has shown that the court clerk and the lower court erred in failing to accept his appellant's briefs. Petitioner further showed how such failing to file the briefs in a timely manner was based upon excusable neglect.

CONCLUSION

Based upon the foregoing facts, federal statutes and case law, your Petitioner respectfully requests this Honorable Court to receive this Petition for Writ of Mandamus, grant review on the issue presented and issue an opinion directing the court of appeals to accept appellant's briefs in accordance to the federal law.

Respectfully submitted,

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APPENDIX PAGE
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO.98-60061

HERMAN WEST, JR.,
Plaintiff - Appellant

v.

CITY OF GULFPORT; KEN COMBS, in his individual and official capacity; GEORGE H. PAYNE, JR., in his individual and official capacity; STEPHEN BARNES, in his individual and official capacity
Defendants - appellees

Appeal from the United States District Court for the Southern district of Mississippi, Biloxi

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ORDER, undated, Before James L. Dennis
United States Circuit Judge

ORDER:

IT IS ORDERED that appellant's motion to file appellant's brief out of time is granted.

IT IS FURTHER ORDERED that appellant's motion for an extension of time until May 14, 1998 to file appellant's brief is granted.

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*The date of entry by the Clerk of the United States Court of Appeals, Charles R. Fulbruge III was June 4, 1998.

APPENDIX PAGE
2.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60061

HERMAN WEST, JR.
Plaintiff - appellant

v.
CITY OF GULFPORT,; KEN COMBS, in his individual and official capacity; GEORGE H. PAYNE, JR., in his individual and official capacity; STEPHEN BARNES, in his individual and official capacity
Defendants - Appellees

Appeal from the United States district Court for the Southern District of Mississippi

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ORDER, dated August 5, 1998, Before Jolly, Smith and Wiener, Circuit Judges.

BY THE COURT:

A member o this panel has previously denied appellant's motion to reinstate the appeal After consideration by this panel upon request of appellant, IT IS ORDERED that appellant's motion for reconsideration is DENIED.